No. 2491

UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

RIALTO IRRIGATION DISTRICT, A CORPORATION,
Plaintiff in Error,
vs.
N. W. STOWELL,
Defendant in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR

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Statute of Limitations

In our opening brief in this action, we discussed at some length the subject of the Statute of Limitations and, in so doing, anticipated, to a great extent, contentions which might be made by our opponent, in order that he might be thoroughly informed of our position in the premises, and thereby enabled to avail himself of any appropriate argument, with which to combat our views, in making his reply. Notwithstanding the op-

portunity thus afforded him for advancing grounds for sustaining the decision of the learned District Court herein, on the subject of the Statute of Limitations, an examination of his brief will, we respectfully submit, disclose a striking absence of any substantial reasons which justify the decision on that subject, or which vindicate the extraordinary supposition that the cause of action of the defendant in error is endowed with the attribute of immortality.

If the law be as defendant in error contends, then unquestionably, there is at last discovered what the Federal Supreme Court (in Campbell vs. Haverhill, 39 L. Ed. 280) facetiously terms:

> "The anomaly of a distinct class of actions *subject to no limitation whatever;* a class of privileged plaintiffs who, in this particular, are outside the pale of the law and subject to no limitation of time in which they may institute their actions."

Surely, if such a startling thing, which the same high court pronounces, is "utterly repugnant to the genius of our laws", can possibly exist at all, its foundation should be something more than illogical reasoning unsupported by any parallel precedents, or well considered authorities.

Particularly is this true in this state where the Supreme Court holds that the Statute of Limitations will run against the collection of taxes, even though such taxes are made a lien upon property and the law specifies such lien shall not be removed *"until the taxes are paid* or the property sold for the payment thereof". (City of San Diego vs. Higgins, 115 Cal. 170; Dranga vs.

Rowe, 127 Cal. 506; Clark vs. San Diego, 144 Cal. 361.)

Upon the threshold of his discussion of the subject of the Statute of Limitations, defendant in error asserts that an irrigation district "is not a municipal corporation in the general sense in which the term is applied generally to municipalities exercising the ordinary functions of government". (Brief, p. 4.) It would seem rather late in the day to assert or intimate that an irrigation district is not a public municipal corporation, a state agency and "formed for the government of a portion of the state, as defined in Section 284 of the Civil Code". (People vs. San Joaquin, etc., Ass'n, 151 Cal. 805; In re Madera Irr. Dist., 92 Cal. 307.)

In County of San Mateo vs. Coburn, 130 Cal. 636, it is said:

> "A county is a governmental agency or political subdivision of the state, organized for purposes of exercising some functions of the state government, whereas a municipal corporation is an incorporation of the inhabitants of a specified region for purposes of *local* government."

In Union Trust Co. vs. State of Cal., 154 Cal. 729, it is said:

> "All public corporations exercising governmental functions within a limited portion of the state—counties, cities, towns, reclamation districts, *irrigation districts*—are agencies of the state just as the board of works created by this act is such agency." (Italics in this brief are ours.)

It is also urged by counsel that the bonds of the district are payable *only* from a particular fund and that there is no power vested in the district by virtue of which

it can obtain funds for the payment of bonds except by the creation of what counsel calls a "Particular Fund". (Brief, p. 4.) This theory is frequently reiterated in the brief of defendant in error and he repeatedly plants himself squarely on this supposition and asseverates that "there is *no other fund*" from which the bonds can be paid (brief, p. 6); that they are *only* payable "out of the special fund provided for" (brief, p. 13); that the bonds belong to the class of obligations which are "payable out of a special fund" (brief, p. 14), and, in effect, the promise of the irrigation district to pay these bonds is purely a conditional one and is coupled with the proviso that "the fund out of which the payment is to be made shall have been collected". (Brief, p. 39.)

The last imaginary proviso at least denotes a certain element of consistency in the views of defendant in error for, as we pointed out in our opening brief, it would be highly illogical to say that an action can be brought and a personal money judgment recovered therein against the maker of an instrument, imposing a *general* liability, and at the same time to contend that, notwithstanding such cause of action had accrued, the Statute of Limitations would not be set in motion contemporaneously with the accrual of such cause of action. On the other hand, if such alleged proviso really exists, no cause of action for a personal judgment on the obligation would arise *until there was money in the fund* from which the same was exclusively and only payable, and in such case, there is room for argument that the statute would not commence to run until the fund was provided, because until then—

and not before—no cause of action would have accrued on such a conditional obligation. (See opening brief, pgs. 54, 62, 76, 92, 93.)

The situation which confronts defendant in error thus forces him to choose which horn of the dilemma seems to him the less dangerous—in fine: (1) whether he will contend that the instrument in question constitutes a "general" obligation, the source of payment of which is not confined to a specific fund, and hence can be sued upon regardless of whether or no such fund exists, in which event, the cause of action accrues upon maturity of the coupon and the statute is then set in motion, or (2) whether he will contend that the instrument is *only* payable from a particular fund and that the holder can look to *no other* source of payment whatever, in which case it would constitute a conditional non-negotiable instrument, and would carry with it *no personal credit* and thus no personal money judgment could be obtained thereon against the maker and no cause of action would accrue before such particular fund were provided, and hence, it might be argued then the statute would not operate. (See opening brief, pgs. 44, 45, 58, 59.) We say "might be argued" advisedly, as even in such a case, the California rule is that the statute will run. (Meyer vs. San Francisco, 150 Cal. 131; S. F. Savings Union vs. District, 144 Cal. 648.)

Defendant in error seems to be well aware of some of the distinguishing features which differentiate a "general" obligation from one that is "special" and which imposes only a limited liability, and, in addition to his

remarks already noted, regarding the supposed restriction of payment to the so-called "particular fund", he unhesitatingly asserts—in his desperate efforts to avoid the consequences which would result from the obligations being held "general" ones—that "*no personal judgment can be recovered against plaintiff in error on these bonds*", and that "though they are payable at a specific date, *they are not negotiable* in a commercial sense". (Defendant in error's brief, pgs. 20, 14.)

We respectfully submit that in attempting to escape from the hazards of Scylla, our opponent inevitably finds himself overwhelmed by the perils of Charybdis, for having firmly committed and nailed himself to the doctrine that the instruments sued on herein are "special" non-negotiable obligations, payable *only* from a non-existent fund, and carrying with them the assumed proviso that the promise of the district to pay is conditional upon "the fund out of which the payment is to be made *shall have* been collected" (opponent's brief, p. 39) and that no personal judgment can be recovered against the district on these bonds, it necessarily follows that the judgment appealed from should be reversed if he is correct in his expressed views. (Kennedy vs. Sacramento, 10 Sawyer 32.)

It cannot be denied that the so-called "particular fund" has not been provided, and it is equally undeniable that our opponent has recovered *a general money judgment against the district* on these very obligations which he tells us contain a condition which furnishes a complete defense to his alleged cause of action on his own

admissions. Let it be once admitted that these instruments are not payable until "the fund out of which the payment is to be made shall have been collected", it is then obvious no cause of action is alleged without averment of the collection of such fund. (See authorities cited in our opening brief, pgs. 39 to 44.)

In defiance of these authorities, our opponent persistently insists that although the obligations in this case upon his theories, can *"only be payable out of the special fund* provided for" (brief, p. 13), "and are not in law or fact, payable except as money is received into this specific fund" (brief, p. 16), yet he can still recover on them against the maker without showing or alleging that this fund exists or ever has existed, and he drives another nail into the coffin of his speculations by likening these bonds to warrants (brief, pgs. 14, 16, 17), which results in making the authorities mentioned, on pages 40 to 44 of our opening brief, still more applicable to this case, because those authorities hold that warrants payable *"out of a particular fund"* create no general liability against a municipality; that no action can be maintained "on the warrants themselves", and that no liability exists until the particular fund comes into existence, in accordance with the well settled principle that when an obligation is payable "out of" a specified fund, the agreement is a conditional one and therefore it is incumbent on a plaintiff, suing on such a contingent contract, to aver and show that the contingency which fixes the liability of the defendant has occurred.

Not only is this a case where any showing of the existence of the alleged special fund is entirely absent, but it is also a case where the defendant in error is attempting to justify the rendition of a general and personal money judgment against the district, thereby stultifying his own position when he asserts that "no personal judgment can be recovered against the plaintiff in error on these bonds" (brief, p. 20), and when he also attempts to distort extracts from our brief into an admission on our part "that no general judgment can be recovered here". (Brief, p. 20.) It is obviously ridiculous to pretend that the judgment appealed from is not both "personal" and "general". (Transcript, p. 50.) It is equally futile to deny that, if our opponent's views be correct, the case of Meyer vs. San Francisco, 150 Cal. 131, upon which he relies, is absolutely opposed to the irridescent notion that a plaintiff can recover a general money judgment against the maker of an instrument which carries with it no personal credit of liability. Extensive quotations are made on pages 46 to 48 of our opponent's brief, from the opinion in the last mentioned case, and an examination of that case will disclose that the court held:

(1). That no cause of action for mandamus was alleged against the city, because (just as we contend here) no averment appeared in the complaint that the fund from which the bonds there were payable had been raised, hence no breach of duty was shown. (150 Cal. 134.)

(2). That no general or personal money judgment can be recovered against a city on bonds, payable out of

a special fund, where the payment of such bonds is confined to such fund and the debt is not otherwise payable and recourse against the city is waived. (150 Cal. 135.)

(3). That in such a case, although a personal money judgment cannot be recovered against the city on bonds which do not constitute *general* obligations, yet the city can be sued for the purpose of recovering—not a general money judgment—but "only a judgment judicially establishing the plaintiff's debt". (150 Cal. 136.)

(4). That a general money judgment obtained on such bonds cannot be upheld and must be reversed. (150 Cal. Syllabus, pgs. 132, 134, 140.)

(5). That notwithstanding the fact a general money judgment was not obtainable on such bonds and that they were to be paid out of a special fund to be raised by taxation upon lands within a certain district of the city, yet *the Statute of Limitations ran against such bonds.* (150 Cal., pgs. 135, 136.)

This decision of the California Supreme Court is of peculiar interest here, as the same issue of bonds (Dupont street bonds) were there involved as were before this Circuit Court of Appeals in Mather vs. San Francisco, 115 Fed. 37. In our opening brief (p. 104), we discussed the Mather case and showed that the same argument, against the running of the statute, was made there as is made in the case at bar and that this Court held that the statute ran against bonds which were payable from a fund which bore infinitely closer resemblance to what, in contemplation of law, is called a "par-

ticular fund" than any fund from which the bonds in the case at bar are payable, and that the decision of this court was reached after the plaintiff in error, in the Mather case, had advanced the identical views, regarding the particular fund doctrine, as are now contended for by our opponent. We thus find that the views of the California Supreme Court and this court accord on this subject—both courts holding that the statute ran against those bonds. The California court, on page 136, cites the Mather case, and in referring to it, says:

> "The latter was an action upon some of the Dupont street bonds, of which the bonds in suit in this case at bar form a part. Upon similar reasoning we can say that the provision that the bonds here involved should be issued in the name of the city and county implies that the city and county can be sued when necessary to preserve the plaintiff's rights and *prevent the bar of the Statute of Limitations,* and that in such action, a judgment can be given establishing the debt for that purpose."

The California Court, on page 135, also says:

> "We think that the plaintiff may nevertheless maintain an action against the city on the bonds, not to enforce payment thereof, but to establish and perpetuate them as a claim upon the funds to be raised under the act, and *to prevent the bar of the Statute of Limitations.* At the time the action was begun but *one day remained of the period of limitation.* By the expiration of that period the plaintiff *would have been barred forever* of all right to enforce payment of the bonds, which the demurrer admits to be valid and unpaid."

When it is observed that in the case at bar, the coupons are *general* obligations and do not merely constitute an obligation against a portion only of the property of the corporation issuing them—as was the case in the Dupont street bonds in the Mather decision—and that their payment is not confined exclusively to any special fund and that—unlike the Dupont street bonds—no claim against the maker for any part of the debt was waived, we respectfully submit that no rational argument can be advanced why the principles already announced by this court and the California Supreme Court do not apply to the case at bar with redoubled force, for if a cause of action accrues and the statute runs against obligations in spite of their being obligations, payable only from funds raised by taxation upon only a portion of the property of the maker and upon which no general money judgment can be obtained, but only a judgment establishing the debt, *a fortiori* it must run where, as in the case at bar, the obligations are not confined to any fund at all for payment; where they constitute express unconditional and general promises to pay upon specified dates, and mature at all events and absolutely on those dates according to contract and where there never has existed the slightest obstacle, fetter or impediment upon the right to sue at any time after their maturity in any court, and obtain a general money judgment thereon against the maker.

It is therefore difficult to see why the case of Meyer vs. San Francisco is cited by defendant in error to support his argument. If it is relied on as a precedent to

vindicate the obtaining of an ordinary money judgment on obligations, supposed by him to be exclusively payable from a particular fund, it is obvious he labors under a misapprehension as to what the court so plainly decided, as the court distinctly holds such a judgment is improper and says:

> "The prayer is for an *ordinary judgment* against the defendant for the amount of the bonds sued on and for costs of the action. The bonds state on their face that they were issued under the provisions of the act of March 23, 1876, for the widening of Dupont street, and that they were to be paid *out of the fund* to be raised by taxation as provided in that act." (150 Cal. 133.)

After holding that there is no obligation on the part of the city to pay the bonds, the court, in referring to the debt evidenced by the bonds, says:

> "It never became a general obligation of the city, to be enforced by a personal judgment against it, such as that prayed for in the complaint.
>
> "The judgment so obtained *cannot be upheld* under the allegations of the complaint. Mandamus lies to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. To authorize a writ, the complaint must show an existing duty and a failure to perform the same on demand. (People v. Romero, 18 Cal. 91; Crandall v. Amador Co., 20 Cal. 75; Oroville etc. Co. v. Plumas Co., 37 Cal. 363.) No breach of duty is alleged except the failure to pay the bonds. Under the provisions of the act, *that duty could not arise until there had been sufficient funds raised by the special tax applicable*

to these bonds to pay the same... (Cramer v. Sacramento, 18 Cal. 384.) This fund may or may not have been raised. It is not alleged, and it is not to be presumed." (150 Cal., p. 134, 135.)

If defendant in error should try to differentiate the last case by contending—notwithstanding his numerous statements to the contrary with which his brief is embroidered—that the bonds here are "general" obligations and their payment is not confined to a special fund to be raised from taxation levied only against a part of the irrigation district, as was the situation in the case last cited, then he unavoidably admits what we contend for. In any event, however, whether the Dupont street bonds were or were not obligations payable from a "special" fund, both this court and the California Supreme Court hold that the Statute of Limitations runs against them. It thus appears that, viewed from any angle, the case of Meyer v. San Francisco is a decision which overturns the Campanile tower of sophistry and illogical arguments of defendant in error, to the effect that: (a) he can legally state a cause of action on an alleged conditional promise to pay without averring the performance of the condition; (b) he can obtain an ordinary, personal money judgment against the maker of paper, which he tells us is payable exclusively out of a non-existent particular fund and upon which he also says no personal judgment can be recovered against plaintiff in error; (c) the statute will not run in spite of the accrual of the cause of action.

Some attempts are made by our antagonist to find a basis for his startling theories by quoting portions of the Wright act and supplementing such quotations by statements to the effect:

(1), "That there is no power vested in the irrigation district by virtue of which it can obtain funds for the payment of bonds except by the creation of what we call the 'Particular Fund' out of which the bonds are to be paid" (Brief, p. 7);

(2). That in the directors of the district, there is vested "no general power by virtue of which they can raise funds for the payment of the bonds in question" (Brief, p. 7);

(3). That "the bondholder must have known that the only way by which he could collect his bond was through the way provided for in the act, viz., by the bond fund" (Brief, p. 13).

Such an attenuated line of reasoning in which our opponent indulges, is tantamount to a mere clutching at straws to keep his unsound doctrines afloat. As we understand his position, it would logically lead to the absurd conclusion, that although an irrigation district might have in its treasury the "wealth of Ormus and of Ind", yet until funds were transferred on its books to its bond fund—which after all is a mere matter of bookkeeping—its bond holders would have no recourse against the district for the collection of the debt. The Wright Act contains nothing which justifies such ideas, nor is there anything in it which upholds for a moment the notion that no general power resides in the directors

under which they can raise funds for the payment of the bonds. Nor is the levying of assessments the only method of raising funds for paying these bonds. Section 41 of the Wright Act (Cal. Statutes 1887, p. 44) gives the directors the widest power of raising funds and provides that:

> "Sec. 41. The Board of Directors may, at any time, when in their judgment it may be advisable, call a special election, and submit to the qualified electors of the district, the question, whether or not a special assessment shall be levied for the purpose of raising money to be applied *to any of the purposes provided in this Act"*. . . . . The assessments so levied shall be computed and entered on the assessment roll by the Secretary of the Board, and collected at the same time and in the same manner as other assessments provided for herein; and when collected *shall be paid into the District Treasury* for the purposes specified in the notice of such special election".

To the same effect is Section 59 of the Act of 1897, governing irrigation districts. (Statutes 1897, p. 274.)

Under Section 22 of the Wright act—which is set forth on pages 50 to 52 of our opening brief—the directors are also empowered to levy assessments to meet the maturing interest and principal of the bonds, and such assessment is not confined to a portion only of the property of the district, as was the case in the Dupont street bonds, as Section 17 of the Act (Statutes 1887, p. 37) provides:

> "Said bonds, and the interest thereon, shall be paid by revenue derived from an annual assessment

upon the real property of the district; and *all the real property* in the district shall be and remain liable to be assessed for such payments as hereinafter provided."

The bonds recite this also upon their face and also state that they constitute "a lien upon *all said real property*". (Transcript, p. 22.)

Furthermore, it is expressly enacted that irrigation districts are permitted to pay bond coupons and purchase bonds from rentals accruing from property leased by the district, as Section 4 of the leasing act (Statutes 1893, p. 296) provides:

> "The rental accruing upon said lease may vary from year to year, as shall be specified in said lease, and shall be payable semi-annually, on the thirtieth day of December and thirtieth day of June of each year. All moneys collected as in this act provided, shall be paid into the treasury, and be used in the manner provided in section thirty-four of said act, except that the period of ten years, as mentioned in said section thirty-four, shall not be applicable to the provision of this act; *provided, however,* that if any coupons on any outstanding bonds of such district are at any time due and payable, and there shall for any reason not be sufficient funds in the interest fund to pay the same, the proceeds so collected, as in this act provided, *may be used to pay the same.*"

Such districts are also given power to sell property purchased by it at its tax sales, the law providing that as such purchaser, it "shall be entitled to the same rights as

a private purchaser" and that the title so acquired may be conveyed by deed, executed by its president and secretary. (Statutes 1889, p. 17.)

Again, such a district is permitted to sell any property held by it which the directors may determine is no longer necessary to be retained for the purposes of the district. (tSatutes 1909, p. 1075.)

In the light of these provisions, it is, we submit, useless to contend that the proceeds of such transactions cannot be applied to the payment of these bonds, or to say that the directors have "no general power by virtue of which they can raise funds for the payment of the bonds". In what way, we ask, is their power any less *general* than the power of trustees of an ordinary municipality? As is the case with an ordinary municipal bond, these obligations are payable from money raised by general taxation, levied under *general* power vested in the directors of the district, against the entire property of all the landowners in the district. Everybody knows that an ordinary municipal corporation has different funds, including a "bond fund", when bonded indebtedness is outstanding, to which money raised by general taxation is allocated. Does such fact bring the rights of the holder of ordinary municipal bonds under the so-called "Particular Fund Doctrine", simply because a "bond fund" is provided for by law, which is to be used for paying such bonds? (See opening brief, p. 75.) Defendant in error ignores the distinction between making an obligation payable *only* from a particular

fund and making a fund applicable only to the payment of such obligation. (Opening brief, pages 52, 62.)

It will not do to say that these bonds are obligations which are "fundamentally different from the ordinary municipal bonds", or that they are akin to warrants and are non-negotiable, etc. (Opponent's brief, pgs. 14 to 17.) Such statements are ungrounded assumption, pure and simple. Counsel furnish us with no authorities, lending support, or even the slightest color, to such hallucinations. Who can consistently deny that these coupons and bonds are not "*general* promises to pay at all events, upon a certain day", payable without condition, and that they mature according to contract like any other municipal bond? (See opening brief, pgs. 84, et seq.; also pgs. 40 to 43.) What similarity therefore exists between such instruments and warrants, when it must be admitted a warrant is a mere direction, addressed to an officer of the public corporation issuing it, to pay money out of some specific fund mentioned in the warrant, and when it is well settled such an instrument does not possess the incidents and qualities of negotiable paper; and when it is remembered that a warrant rarely specifies the date upon which it is payable?

It accordingly has been held illegal to issue bonds when the issuance of warrants was only authorized and that " a warrant is an order by which the drawer authorizes one person to pay a particular sum of money". (Shawnee County vs. Carter, 2 Kas, 115.)

In Shelley vs. St. Charles County, 21 Fed. 699, says Mr. Justice Brewer:

> "There is a vast difference between bonds and warrants. Warrants are general orders payable *when funds are found,* and there is propriety in the rule providing that they shall be paid in the order of presentation, the time of presentation to be indorsed by the treasurer on the warrants. But bonds are obligations *payable at a definite time,* running through a series of years."

The California Supreme Court long ago held that an action would not lie on a warrant itself, the instrument not being payable absolutely, but only in case the designated fund was sufficient to meet it (opening brief, p. 43), and this Circuit Court of Appeals, in Pauly Jail Bldg. Co. vs. Jefferson Co., 160 Fed. 866, affirmed a judgment of nonsuit, in an action brought on warrants, and held there could be no such thing as a refusal to pay the warrants "*until there is a fund available*" and quoted with approval the Washington Court, in distinguishing between a warrant and a negotiable note, saying:

> "But there is this difference, a note can be sued upon, judgment taken, execution issued and property levied upon and sold, and the debt paid, but no action lies *either upon a warrant* or the original debt."

It will therefore be seen that this court concurs with the numerous authorities, cited on pages 40 to 44 of our opening brief, which hold that where an instrument, like a warrant, is payable only from a particular fund, an action cannot be maintained thereon until the fund is raised. (See also Brooks vs. San Luis Obispo, 109 Cal. 50; Cramer vs. Supervisors, 18 Cal. 385.)

In his zealous efforts to avoid the breaking down of his position, respecting the running of the Statute of Limitations, by these obligations here being held to be "general" obligations, it will be observed that defendant in error has, by espousing the theory that they are substantially the same as non-negotiable warrants, carrying with them the proviso that they are not payable in law or fact *unless money* is in the fund (brief, pgs. 14, 16, 39), brought himself squarely within the principle, under which relief is denied a plaintiff on the grounds that he has failed to prove a cause of action.

If counsel really believes these bonds and coupons to be non-negotiable, in spite of the mandate of the Wright act, providing that *they shall be negotiable in form* (opening brief, p. 49), and in spite of Section 3095 of the Civil Code of this state, specifying that "bonds" are *negotiable* instruments, and in spite of the case of Stowell vs. Irrigation District, 155 Cal. 223, holding that the bonds are negotiable in form, why did he repeatedly aver in his complaint that the plaintiff "did in good faith, and in the ordinary course of business, and for value before the apparent maturity of the said bond and coupons, and without knowledge of their actual dishonor or any defense thereto, if any such existed, purchase said bond"? (Transcript, pgs. 24-28.) Why also did he go out of his way in an endeavor to prove such allegations? (Transcript, p. 53.)

It still remains true that if these bonds are non-negotiable, as defendant in error claims, then practically *every other municipal bond in the country* is also non-

negotiable, and he is then also confronted with the difficulty of solving the problem of how in such event the bonds constitute binding obligations of a district, where power under the mandatory provisions of the Wright act is limited to issuing bonds "negotiable in form". (See opening brief, pgs. 44 to 47.) How can these bonds be "negotiable in form" if the fantastic claim be correct that:

> "The bond itself contains a recital to the effect that it is payable out of the fund which is to be provided in a particular way for that purpose. It amounts in effect, if not in terms, to a promise on the part of the district to pay the principal and interest of the bond at the dates therein mentioned, *provided the fund out of which the payment is to be made shall have been collected.*" (Defendant in error's brief, p. 39.)

Upon this subject of bonds payable solely from a special fund, Judge Dillon, in Section 893 of his treatise on Municipal Corporations (Fifth Edition), says:

> "Respecting the question of the negotiability of these instruments, it has been held that because the bonds are not payable unconditionally and at all events, but only out of a special fund created and pledged to the payment, which may or may not prove adequate to meet the obligation in full, they do not have that certainty of payment which is essential to negotiability and that *they are not negotiable* instruments within the law merchant.

Counsel would have us believe that the bonds involved here belong to the class referred to in the last quotation, and argues that the Legislature, in designating that the

bonds should be negotiable in form, did not intend that they should be negotiable in fact. (Brief, p. 15.) If this be true, it places our Legislature in the invidious position of deliberately enacting a law which has for its special object the circulation of public securities in the open market, which securities purport to be what they are not.

We hardly think such a palpable "sticking in the bark" and strange process of reasoning will commend itself to this court, when it is clear that the tangle of fallacies, contained in the brief of defendant in error, regarding the non-negotiability of this paper by reason of its being payable from a suppositious "particular fund", are unraveled and dissipated if it is only borne in mind that:

> "Taxes are the primary source of municipal revenue, and money accumulated entirely from taxes with which to meet a general obligation to pay *cannot be said to be a particular fund,* in the sense of the decision, nor can it be said that taxation, the chief method of raising municipal revenue, is *a special or particular method.*"
>
> Schoenhoft vs. Kearney Co., 92 Pac. 1097.

Each struggle of defendant in error to emerge from the quicksand in which he has buried himself, through embracing such untenable doctrines, only results in revealing fresh inconsistencies.

In one breath, he informs us that "there is nothing upon the face of the bonds here indicating *what fund they are payable from*". (Brief, p. 15.)

In the next, he says that "the bond itself contains a

recital to the effect that it is payable *out of the fund,* which is to be provided in a particular way for that purpose". (Brief, p. 39.)

At one time, he asserts that the bonds are not in reality payable, "in law or in fact *upon the dates indicated upon their face,* except or provided that there is money in the specific fund" (Brief, p. 16), while he subsequently insists that "the district, by the due execution of its bond, has *expressly agreed to make certain payments at certain dates*". (Brief, p. 39.) Again, he says that these bonds are different from ordinary municipal bonds in that they are only payable from a special fund, but he signally fails to show how this fund is any more "special" than any other "bond fund" of a municipal corporation derived from general taxation (Brief, p. 14.) A strenuous effort is also made to bring these bonds into the same category as the warrants mentioned in Shoenhoeft vs. Kearney Co., 92 Pac. 1097, and lengthy quotations are made from that decision—which decision we rely upon as supporting our contentions, see opening brief, page 53 and 84 to 89—with the apparent hope that by a draft on anticipated credulity, a decision may result here holding that these bonds, like warrants, "are merely drafts on anticipated revenue" (Brief, p. 16.), notwithstanding these bonds are destitute of any earmark of a "draft" or order to pay.

We challenge our opponent to point out a single existing feature of these bonds which renders them any more like warrants than are ordinary municipal bonds, and his labored argument on this subject savors and

reminds one of that primitive sort of logic which, according to travelers, enables the Samoyed to see a striking likeness between a cow and a comet in that they both have tails.

We respectfully submit that to follow the theories our antagonist contends for would not only constitute "a precedent without a precedent", but would also inevitably result in the most wide-spread disturbance of well settled legal principles respecting municipal bonds in general.

Conspicuous among those principles is the firmly rooted tenet that it is not permissible to convert a flat promise to pay, contained in a bond, into a promise to pay *out of a particular fund,* and that where it is provided that a bond is paayble from assessments, but it is neither expressly nor by necessary implication provided that the bond may not be paid in some other mode, the holder may resort to the general liability of the maker arising from the promise to pay. No attempt is made by defendant in error to answer the array of authorities referred to in our opening brief, on pages 52 to 66, showing conclusively that these bonds are "general" obligations, unless the partial quotation from Dillon on Municipal Corporations, appearing on page 18 of the brief of our opponent, can be considered an answer.

The quotation, however, was not fully given, as it was broken off in the middle of a sentence. When the whole sentence is quoted, Judge Dillon's views harmonize with the authorities we cited, and in reading the same it will be noted that he announces the rule to be that a bond

which contains a direct promise to pay, and is not declared to be payable *only* from the fund (which is true here) is a *general* obligation *"although the bond also recites that it is issued to provide for the payment of the cost of an improvement which cost is chargeable against the property benefited and is made a lien thereon"*. He says:

> "But if the enabling act does not *in express terms* limit the power of the municipality to an issue of bonds which are payable *only* from the special assessment or other designated fund, or if the municipality, besides having power to issue bonds under a statute so limiting its liability, has also power to issue its general obligations, a bond which by its terms is the direct and absolute promise of the municipality to pay a definite sum of money with interest and is not declared to be payable only from the fund, is the *general obligation* of the city, payable from its general funds or general power of taxation, although the bond also recites that it is issued to provide for the payment of the cost of an improvement, which cost is chargeable against the property benefited and is made a lien thereon."

It is true that the bonds here recite that they are "to be paid by revenue derived from an annual tax upon the real property of the district" (opening brief, p. 48), but, as everybody knows, this is true with respect to ordinary municipal bonds and it is preposterous to contend that this recital converts the obligation into a special one, payable exclusively from a particular fund.

In the same section 893, from which the abbreviated quotation is taken, appearing upon page 18 of our op-

ponent's brief, Judge Dillon, in referring to the recital mentioned in the quotation, we have already given, further says:

> "In effect, this is only a recital of the power possessed by the city for levying and enforcing a special assessment, as a means towards providing funds for the payment of the debt created by the issue and sale of the bonds; and *if there is no declaration in the bonds* to the effect that they are payable *only* out of the particular fund, the *general liability of the city is not limited thereby.*"

This is precisely what is held by the authorities which we cited in our opening brief (pages 52 to 66). Referring to securities, such as local improvement bonds, Mr. Abbott in Section 364 of his work on Public Securities, says:

> "The promise to pay *is the primary contract,* the obligation on the part of the public corporation to raise a special fund or levy special taxes is a separate and independent one, the failure to perform which *does not or cannot affect the right of the holder to enforce the security according to its terms and against the maker.*" (Citing numerous authorities.)

It cannot be gainsaid that under these oft-enunciated principles, the bonds here are obviously of the same class as ordinary municipal bonds, to-wit: *general* obligations of the maker. Being *general* obligations, the particular fund doctrine vanishes and with its disappearance the notion, that the statute does not run under such doctrine, is also obliterated, because, as we have seen, no obstacle

lies in the path of the holder of a *general* obligation to prevent or excuse his suing upon its maturity, and obtaining judgment thereon. (Opening brief, pgs. 84 to 90; 93 to 99.)

Operation of Statute Not Suspended

Defendant in error further argues that if the operation of the Statute of Limitations can be suspended by express agreement to that effect, it necessarily follows that it can be suspended by implication and by conduct and that the conduct of plaintiff in error was sufficient to cause such suspension. (Brief, p. 9.)

Whatever may be the rule on this subject in other jurisdictions, we submit that such an hypothesis is untenable in this state, where Section 360 of the Code of Civil Procedure provides that:

> "No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby."

In the face of this statute, it is indisputable that the claims of our opponent on this subject are clearly untenable.

In the case of Rounthwaite vs. Rounthwaite, 68 Pac. 304, the California Supreme Court, in referring to a similar contention, says:

> "Appellant urges an estoppel by conduct against defendant. We fail to discover any elements of estoppel in the case; and, besides, an estoppel in pais

> cannot be urged as against the plain requirements of the statute that the promise must be evidenced by writing to remove the bar. Such proof thus becomes exclusive."

We again reiterate that as the bonds here are general liabilities, similar to ordinary municipal bonds, the effect of upholding such a doctrine as is advanced by the defendant in error, would be of the most far reaching character, and would open the door to all sorts of situations whereby the plain requirements of this section of thecode would be rendered nugatory.

In Shapley vs. Abbott, 42 N. Y. 443, the court says:

> "The policy of the statute, requiring that every promise or acknowledgment, to take a case out of the statute, shall be in writing, signed by the party to be charged, is to prevent fraud and perjuries. And it is the duty of the courts so to administer the law as to uphold this policy. If a parol promise not to plead the statute is to be held operative, either as a waiver, or an agreement, *or by way of estoppel,* to subvert the statute, then all the mischief, as this case shows, will be let in which it was the policy of the law to shut out."

Irrespective of Section 360 of the Code of Civil Procedure, and should we consider that no such section exists, it is even then patent that not the slightest ground for the claim of any estoppel exists here and no act on the part of plaintiff in error, has been shown which can be tortured into any estoppel. (See Shapley vs. Abbott, supra.)

Lincoln County vs. Luning

Defendant in error in his brief (p. 10) compares the case at bar to the Luning case. In our opening brief, we pointed out some of the prominent features of the Luning case, which distinguish it from the case at bar (opening brief, pgs. 78 to 104), and we fail to find anything in the brief of defendant in error which answers any of the seven points of distinction, existing between the two cases, and which are set forth in our former brief on pages 101 to 104. In fact, our adversary admits that originally the bonds in the Luning case were *general* obligations (brief, pgs. 11 and 13), and that but for the subsequent act of 1877, there would have been no question in that case that the statute ran against those bonds. As we have no such subsequent legislation here and as the payment of these bonds, for reasons already shown, is not confined to any particular fund, as they are not payable *solely and exclusively from any fund*, we respectfully submit, that no resemblance between the two cases exists.

The assertion that these bonds are akin to the Luning case bonds, based upon the theory that the act of 1877, providing for registration, etc., in that case, makes them similar (brief, p. 13), we deem "so original as to be almost aboriginal".

Freehill vs. Chamberlain

The case of Freehill vs. Chamberlain, 65 Cal. 603, seems to be the authority upon which defendant in error principally relies.

In our opening brief we cited different authorities and reasons showing why that case was inapplicable here (pages 87, 90, 96, 97, 98, 101, 102, 118, 119.) Respecting that case, our antagonist argues that what the California Supreme Court said about it in Barnes vs. Glide, 117 Cal. 9, was merely dicta (brief, p. 25) and that the supervisors could have been compelled to levy the tax and thus raise fund with which to pay the bonds in the Freehill case. But what our opponent entirely ignores is the stubborn fact that in the Freehill case the bond holders were prohibited from suing the maker of the bonds, to-wit, the city of Sacramento, and that was obviously the principal ground for the decision that the statute did not run. In the Barnes case (117 Cal. 9), the court expressly says that the bondholders in the Freehill case *"were prohibited from suing the city"*; that they "were to rely *exclusively* upon a certain special fund"; that the only remedy which they had was mandamus against the treasurer "to compel him to pay the interest on the bonds when there was money in the fund to which *they could alone look under their special contract*".

When defendant in error can overturn the multitude of authorities, in line with those cited in our opening brief (pages 56 to 66), to the effect that an express, unconditional promsie to pay will not be distorted into a *special* obligation or be limited or confined to any fund or shorn of the primary and general liability that accompanies such promise; when he can show the slightest authority—as distinguished from mere assertion or as-

sumption—for the theory that it is necessary in the case at bar to inject a condition into the language of these bonds, coercing their holders to "look alone" to any fund for payment; and when he can, in the face of the unnumbered suits sustained against irrigation districts, successfully interpret Section 14 of the Wright act (Statutes 1887, p. 35), providing that such districts may be sued, to mean that they are not subject to suit, it will then, we submit, be time to compare this case to the Freehill case.

It will also be noted that the bogey of possible concert of action of the district officers in omitting to perform their duty (brief, p. 31) does not exist here as, in the event of such neglect, a distinterested body can be applied to for levying taxes. (See opening brief, p. 77.)

In Kendall vs. Porter, 120 Cal. 106, although the question here, regarding the Statute of Limitations, was not involved in the case, the dissenting opinion of Mr. Justice McFarland refers to the nature of the contract contained in the bonds involved in the Freehill case, and he illuminates some of the points under discussion here and says:

> "The rights which the appellant has against the city *are not those of a general creditor.* He could not recover a judgment against the city, upon his bonds, for a single dollar; for the bonds were issued and accepted by the bondholders under a statute which provides that the city *"shall not be sued* in any action whatever." . . . . "I think that in the case at bar the majority opinion treats this proceeding as an action against the city by a *general*

creditor to recover a judgment for interest on overdue bonds; but, in that view, appellant could not recover either the principal or interest of his bonds, *for both would be barred by the Statute of Limitations.*"

In the dissenting opinion of Chief Justice Beatty, concurred in by Mr. Justice Van Fleet, in the same case, it is said:

"If there had been no other special provisions as to the time and mode of payment of the bonds and coupons, they would have carried with them the usual obligations and incidents of such securities. But there were very special and peculiar provisions contained in the act regulating and restricting the rights of the bondholders as to the time and manner of payment. The bonds *were not a general obligation* of the city payable out of any unappropriated revenue, but were to be paid *only* as provided in the act; that is to say, out of the special sinking and interest thereby created." . . .

"Such being the provisions of the statute, and the bonds having been issued in strict conformity thereto, it is apparent—as has been many times decided by this and other courts—that the rights of the bondholders *are not the same as those of holders of ordinary coupon bonds.* Their rights are, on the contrary, strictly measured by the terms of this statute, and they can claim nothing under general provisions of law inconsistent with it. They are to be paid certainly, but they are to be paid only in the manner and in the order as in this act provided. It contains the terms offered to the creditors of the city. They accepted those terms and thereby contracted to be bound by them.

"As remarked by Judge Sawyer in Kennedy vs. Sacramento, 10 Saw. 32: 'The parties who surrendered their prior evidence of indebtedness and took these bonds took them under the provisions of this act, which was a contract made between the city and them that the bonds should be collected *only in that particular mode, and no other;* that there should be no other remedy for them—*that the city should not be sued.* The advantages which they obtained are subject to the provisions made for their payment, to the limitation put upon their remedy. The advantage to the city was that it *should not be harassed by any other kind of suit,* an extension of time for payment, and the reduction of the rate of interest. The advantage to the holders was the specific, certain and permanent provision made for prompt payment in the future.' . . .

"In Freehill vs. Chamberlain, supra, which was mandamus to compel the treasurer to pay coupons more than four years past due, the Statute of Limitations was interposed as a defense, but it was held that, since *the city could not be sued* upon the coupons, the statute did not begin to run until the money applicable to the payment of the coupons was in the sinking fund, *the implicit concession being that the coupons would have been barred if there had been any general obligation resting upon the city to pay.*"

The foregoing opinions of Judges Beatty, McFarland and Van Fleet show the peculiar and almost unique character of the Sacramento bonds involved in the Freehill case and show plainly that, as the bondholder *was precluded from suing the city,* they did not constitute *general* obligations. It is true that these opinions were

dissenting opinions, but the prevailing opinion contains nothing which militates against the views we have advanced respecting the Statute of Limitations, as the prevailing opinion deals with a different subject. Moreover, the remarks of Judge Sawyer, in Kennedy vs. Sacramento, 10 Saw. 32, quoted by Judge Beatty in his opinion, bear out our contention when he dwells on the fact that *the immunity of the city from suit* precluded all other remedies except the one specified.

The impossibility of suing the maker of those bonds is adverted to in the Freehill case, and also in all decisions where the Freehill case is discussed, and it was upon that point which the Freehill case turned. Defendant in error apparently ignores this striking dissimilarity between that case and the one at bar. He further insists that the California court was wrong where, in referring to the Freehill case, in Barnes vs. Glide, it said that "the *only* remedy which the bondholder had was mandamus against the city treasurer". It is also claimed Freehill could have compelled a levy of the tax and hence mandamus against the treasurer was not the only remedy. (Brief, p. 24.)

Should we assume that the defendant in error is correct in thus overruling the California Supreme Court, it does not appear how he is in any better situation. He is still confronted with the proposition that Freehill *could not sue the city,* and hence the statute did not run. The importance of this feature is ignored by our opponent notwithstanding that he italicizes, on page 45 of his brief, a quotation from Barnes vs. Turner, wherein it

is said that "if the Statute of Limitations *could not be urged as against the collection of the debt, evidenced by the warrants,* then it should not be urged as against the necessary preliminary steps towards the collection thereof", and the court there further held that "an action in mandamus is simply a preliminary step towards the enforcing of the payment of these warrants". It is very clear from this language that the implication arises that, if the debt were barred, then any proceeding in mandamus to raise funds to pay such debt would also be barred.

The fallacy indulged in by our adversary respecting the Freehill case, when he argues that, if we are correct in our reasoning, the statute had run in that case (by reason of his claim that the officials of the city could have been compelled by mandamus to replenish the fund from which those bonds were payable) becomes apparent when measured by the rule announced in Barnes vs. Turner, for the latter case distinctly holds that *if the main obligation is not barred by the statute,* then the step of mandamusing the officials of the municipality *is not* barred. Now, as has already been pointed out, the court held the Freehill bonds were not barred, hence it would follow that, under the rule announced in Barnes vs. Turner, the so-called "preliminary step" of mandamus was also not barred in that case. (See also discussion regarding mandamus in Berkey vs. Commissioners, 110 Pac. 201.)

The existence of a "statutory prohibition", preventing

the commencement of an action against the city in the Freehill case, also furnishes a reason for that decision. (Sec. 356, C. C. P.; opening brief, p. 98.)

Counsel tells us 'that *the contention is made here* that if the creditor can compel the creation of the fund by mandamus to the proper officers to levy the necessary tax, then the particular fund rule does not apply" (brief, p. 24), and lengthy quotations are made from the brief of respondents in the Freehill case which are supplemented by the statement that "the very contentions made here by plaintiff in error were made by respondent and passed upon by the Supreme Court in the case of Freehill vs. Chamberlain". (Brief, p. 28.) In reply to such statements it will suffice to say that not only have we no recollection of making such contentions on this appeal, but there is an utter failure on his part to point out where such theories were set forth in our opening brief, so it is not worth while to ascertain whether or no the theories mentioned, are applicable here. However that may be, the bedrock fact remains that the Freehill bonds were not *general* obligations upon which a general, personal money judgment could be recovered against the maker, who was expressly exempted from the liability of a suit on such bonds, and therefore it is futile to insist that such obligations bear any resemblance whatever to these bonds, where the irrigation district has at all times been subject to suit; where at any time after its default, a personal, general money judgment could have been recovered against it on the bonds, and where, neither

expressly or impliedly, is the payment of these bonds made conditional upon the existence of, or confined to, any fund whatever.

This being the situation, argument is superfluous to show that this is not a case, similar to the Freehill class of cases, where the maker of a *special* obligation, has prevented or neglected the raising of funds to meet such *special* obligation and by reason of exemption from suit is enabled to *require the creditor to look solely to the missing fund and not to the maker.* (See opening brief, pages 115, 96, 97, 98.)

Barnes vs. Glide

We quoted from and commented upon the case of Barnes vs. Glide, 117 Cal. 1, on pages 90 to 98 of our opening brief. Our adversary attempts to parry the force of the Barnes decision by claiming that it was not a "particular fund" case, and quotations are made from the argument of the respondents in that case, with the apparent object of supporting this theory.

When it is remembered that in the Barnes case (a) a registered warrant was before the court, directing the treasurer to pay "from the Swamp Land Fund" and that, therefore, there existed infinitely stronger grounds for calling it a *special,* instead of a *general,* obligation (opening brief, pgs. 40 to 45); (b) that the sources of payment of such warrant under the laws then in force were, as here, assessments upon property within the Reclamation District (Statutes 1868, p. 516); (c) that no more pledging of funds or assessments with which to

pay these bonds has occurred here than occurred with respect to the Barnes' warrant and that, warrants have always been apparently deemed more subject to the particular fund doctrine than negotiable bonds (opening brief, p. 83); yet, in spite of these features, the California Court upheld the Statute of Limitations against such warrants, it is perfectly plain, we respectfully submit, that the statute has run here.

If the Barnes case, involving a warrant expressly and specifically payable *from a designated fund,* is not a "particular fund" case, as counsel asserts, it certainly will not do to say that this case at bar is a "particular fund" case, when it involves bonds, containing flat promises—not mere directions—to pay at specific dates, which bonds are entirely destitute of any limitation upon the source of their payment and are strictly negotiable in form.

The Barnes case was not decided upon any occult or cryptic reasons or upon any hair-splitting sophistries regarding the method of bookkeeping, or of separating any funds on the district records; on the contrary, it was decided upon the clearest possible ground, to-wit: it was a "proceeding *which might have been commenced fifteen years before it was instituted*", and for this reason, the California Court expressly differentiates the Barnes case from the Freehill case. (See last sentence of opinion, 117 Cal., p. 9.)

So we ask here, could suits have been brought on these coupons which matured in this case, more than four years before the present action was instituted? Even

our opponent will not have the hardihood to give a negative reply to this question, notwithstanding such reply goes to the very heart of the whole matter, and hence, under our code, which admits of no exceptions, it is evident the statute has run against such coupons. (Sec. 312 C. C. P.)

It was upon similar grounds the case of San Francisco Savings Union vs. Reclamation District, 144 Cal. 648, was decided.

Berkeley vs. Board of Commissioners

Defendant in error also relies on Berkey vs. Commissioners, 110 Pac. 197. (Brief, p. 37.)

An examination of that case discloses that what was there said about the Statute of Limitations was dictum, as the court found that the action was commenced about three and one-half years after the maturity of the bonds there under discussion and hence was not barred by the six-year statute of Colorado, which was the statute held applicable to such obliagtions, but in any event the opinion of the court fortifies, rather than weakens, our conclusions here. Those bonds were apparently not *general* liabilities, as the Colorado court says:

> "The method therein provided for payment is exclusive. *No action for a money judgment on the bonds would lie.*"

This shows that those bonds were somewhat similar to the bonds in the Freehill case and could not be held to be *general* obligations, carrying with them personal credit, and our remarks respecting the Freehill case apply to the case in question.

Barnes vs. Turner

The case of Barnes vs. Turner, 78 Pac. 108, is another case upon which defendant in error relies (brief, p. 40). That case was decided by the Oklahoma Supreme Court and involved warrants—not bonds. We have heretofore pointed out the conspicuous distinction between a warrant and a bond isued by a municipal corporation. (See also Schoenhoeft vs. Kearny County (Kas.), 92 Pac. 1097, and opening brief, pages 83 to 90.)

The warrants in this Barnes case, as is almost invariably the case with warrants, expressly on their face, designated the fund from which they were payable, and hence carried with them the resultant consequences attending such form of obligations (opening brief, pages 40 to 45). The court held that the statute had not run against the warrants, as no fund had been provided with which to pay them, and allowed write of mandate to compel levy of tax. Here again, the warrants were not *general* obligations. It further appears Turner had previously brought suit on the same warrants and the Oklahoma court, in Turner vs. Guthrie, 73 Pac. 283, had held mandamus to compel assessments was the sole remedy and that such warrants could not be sued upon and a money judgment obtained, and cited with approval the case of Wilson vs. Aberdeen (Wash.), 52 Pac. 524, in which latter case it was held warrants for street improvements could not be collected against the city *generally*, even though the remedy to compel assessments

was lost, either through exhaustion of the property or by being *barred by lapse of time,* the Washington Court saying:

> "It is not clear whether the remedy was lost in consequence of the exhaustion of the property covered by the special liens which was of any value, or *whether it was barred by lapse of time;* but it would not make any difference. . . . The obligation rested upon the warrant holders to compel the officers of the city to proceed with the collection of the assessments, and if they saw fit to allow their remedy to become lost through a failure to compel an enforcement of the assessment proceedings, they, and not the general taxpayers, must bear the consequences."

These last quotations contain a plain intimation that the statute will run against mandamus, even though an action cannot be maintained upon the obligation and a general money judgment secured against the maker and even though such obligation is not a general one, which harmonizes with what the California Court said in Meyer vs. San Francisco, 150 Cal. 131, in which latter case, the court held the statute would run against obligations not capable of supporting a general money judgment.

Again adverting to the case of Barnes vs. Turner, it will be observed that the precedents cited by the Oklahoma Court are nearly all the same cases, discussed in our opening brief, where we endeavored to point out why they are inapplicable to the case at bar. The case

of Robertson vs. Blaine County is mentioned, upon which case we comment on page 122 of our opening brief. The Kansas cases of Hubbell vs. South Hutchison and School District vs. Bank are also cited in Barnes vs. Turner, but in the subsequent Kansas case of Schoenhoeft vs. Kearney County, 92 Pac. 1097 (see opening brief, p. 86), the court, in referring to these cases, expressly says:

> "The court had in mind nothing but the specific class of instruments it was then consiedring, viz., municipal *warrants*. It was not the purpose to settle (or more accurately stated, to overturn) the law relating to the limitation of actions upon ordinary municipal bonds."

Bearing in mind that, as we have seen, the Oklahoma Court held that mandamus was the *sole* remedy of which a holder of the warrants then in question could avail himself, it becomes absurd to liken this case to the case of Barnes vs. Turner, and when the opinion in the latter case is analyzed, it will be seen that it contains the qualification that *"if the Statute of Limitations could not be urged as against the collection of the debt* evidenced by the warrants, then, it should not be urged as against the necessary preliminary steps (mandamus) towards the collection thereof". (78 Pac. 110.) Now in the case at bar, the statute *can be urged against the collection of the debt*, as the bonds here are not special obligations which, like the Oklahoma warrant, would not support a general money judgment against the maker,

with respect to which warrant, in Turner vs. City of Guthrie, 73 Pac. 283, the court said:

> "The city of Guthrie *never contracted to pay it in any way.*"

When the California Supreme Court has spoken so plainly on this subject of the Statute of Limitations and when the Federal Courts "recognize the Statute of Limitations of the several states, and give them the same construction and effect which are given by the local tribunals" (Amy vs. Dubuque, 25 L. Ed. (U. S.) 228, and other cases cited in opening brief, pages 15 to 21), it is difficult to see what is gained by traveling as far as Oklahoma to ascertain what is there considered the correct doctrine, respecting the running of the statute against a warrant, and whether the Oklahoma doctrine should apply in this state. That question is a mere hypothesis, but what is not an hypothesis, but a demonstrated fact, is that the California Supreme Court has squarely held, in Barnes vs. Glide, 117 Cal. 1, that the statute will run even against a warrant, placing its decision on the broad ground that the proceedings "might have been commenced fifteen years before it was instituted", and that the statute "is intended to embrace *all* causes of action not specially excepted from its operation, and there is no exception applicable to the present proceeding", and fortifying that decision with such cases as Savings Union vs. Reclamation District, 144 Cal. 648, Meyer vs. San Francisco, 150 Cal. 131, and Cal. Safe Co. vs. Sierra Rwy. Co., 158 Cal. 691. (See also opening brief, pgs. 27 to 36.)

Other Cases Cited by Defendant in Error

The case of Waite vs. Santa Cruz, 89 Fed. 619, is also referred to by our opponent (brief, p. 21). This decision simply buttresses what we have said, respecting the statute, and like Nevada National Bank vs. Supervisors, 5 Cal. App. 638, and Meyer vs. San Francisco, 150 Cal. 131, shows that the defendant in error's right to sue on these coupons, ever since their maturity, has been absolutely untrammeled, hence, in the face of Section 312 of our Code of Civil Procedure and the authorities holding no exception to the statute can be made by t he courts, it is unavailing to argue the statute does not commence to run with the accrual of the cause of action.

The case of Hewel vs. Hogin, 3 Cal. App. 248, is also cited by our opponent (brief, p. 39). This case, as well as the case of Sawyer vs. Colgan, are commented on in our opening brief (pgs. 128, 117).

The sentiment expressed by the court in Tulare Irrigation District vs. Shepard, to the effect that "common honesty" demands that a debt should be paid, is also invoked by defendant in error. Such expressions, of course, have nothing to do with the Statute of Limitations. In any event, "common decency" demands that a plaintiff should be entitled to no indulgence, who for many years has remained supine, under the circumstances existing here. (See Eddy vs. San Francisco, 162 Fed. 441, 148 Fed. 277; Savings Union vs. Reclamation District, 144 Cal. 649; and our opening brief, pgs. 68 to 75).

The Legislature Did Not Contemplate These Bonds Should Be Immune from the Operation of the Statute

That the California Legislature did not contemplate that these bonds hould be exempt from the effect of the statute appears from an amendment to the act providing for the dissolution of irrigation districts, which amendment is contained in California Statutes, in year 1909, at page 139, and is as follows:

> "Section 10½. In the petition mentioned in section 2 of this act, it shall not be necessary to include in the schedule of indebtedness any bond, coupon, warrant or other indebtedness, claim or demand which *shall have been barred* by the laws of this state prior to the filing of said petition with the board of directors of said irrigation district, nor shall it be necessary in winding up the affairs of any district organized under the laws of this state to pay all or any portion of a debt or obligation of such district, for the enforcement of which debt or obligation, a suit is *barred by the laws of this state.*"

The bonds further recite upon their face, that "the said bonds are by said act of the legislature, made a *lien upon all said real property*". (Trans., p. 22.)

Whoever heard of bonds constituting a lien upon *all* of the real property of a public corporation being held *special* obligations payable only from a particular fund?

Confusion of Right and Remedy

In our opening brief, we invited the attention of the court to the palpable confusion of right and remedy

which apparently is the basis and cause of the judgment appealed from. (Pages 111 to 117, and 132 to 137.) We pointed out that the learned trial court held that the statute did not run for the reason that in the Federal Courts "mandamus is not available in the first instance, but only after the plaintiff's claim has been reduced to judgment". (Opening brief, p. 113.) We also attempted to show the fallacy of any reasoning which relies upon the unavailability of the writ of mandamus to a plaintiff, before obtaining judgment, as a ground for holding that a cause of action cannot accrue and consequently, the statute cannot run. (Opening brief, p. 133.) Notwithstanding such an obvious proposition, our opponent clings tenaciously to the question of "remedy"—or perhaps it would be more accurate to say the "relief"—as affecting the right to sue and the accrual of his cause of action. In floundering in the whirlpool of perplexities to which he has consigned himself by entertaining these illogical notions, he endeavors to extricate himself by such irrelevant remarks as: "Does the right to sue the Rialto Irrigation District and obtain a judgment on these bonds afford a remedy which brings the holders of the bonds any nearer to the recovery of their money than were the holders of the bonds in any other particular fund cases, who, counsel say, did not have such right to sue"? (Brief, p. 19.) Such a question merely demonstrates that the defendant in error imports a foreign element into the controversy. The answer to such a query would be as lacking in pertinency to the subject under discussion as were the celebrated

remarks, concerning "milestones on the Dover road", interjected into a serious conversation by the old lady in "Bleak House".

It is reasoning in a grotesquely absurd vein to argue that, while it is undeniable the right to sue an individual or a corporation is not affected by such prospective defendant being "execution-proof"; while it is also true that the property of any municipal corporation cannot be subjected to an execution levy; while it is also not to be gainsaid that the question of what step a plaintiff is going to take to satisfy his judgment has absolutely no bearing on his right to obtain such judgment; while it is axiomatic that the "right to sue" is equivalent to the "accrual of a cause of action", which right and accrual are things entirely distinct and apart from the consideration as to what means will ultimately be employed to enforce obedience to or obtain payment of the decree or judgment finally rendered in a legal proceeding, yet this irrigation district is to be deemed *sui generis* and, because it is sued in the Federal Court, it must be deprived of the defense of the Statute of Limitations, on the theory that it has no property subject to execution, although such condition is generally common to all public corporations.

We again ask how is it material to the inquiry, as to when a given cause of action accrues, to consider *how the judgment in the suit may be enforced?* (Opening brief, p. 137). If it is immaterial to ascertain how the judgment may be enforced, as regards the accrual of the cause of action, it is equally beside the case to determine

how the judgment will be enforced, when it comes to the question of the time when the statute commences to run.

The inability of obtaining the particular remedy or relief of mandamus before securing judgment in a Federal Court, has never yet, for a single moment, delayed or prevented a plaintiff from entering such a court and suing on his obligation and getting a judgment. To say therefore that the plea of the statute in a case like this, may be good in a state court and no good in a Federal Court, we respectfully submit, is a statement which is not founded on authority and is lacking in logic. It might as well be urged that although our code prescribes that a promissory note will be barred in a period of four years from its maturity, a different rule should be applied when such note is secured by a mortgage, upon the theory that in order to enforce the rights of the holder in the latter case, he is compelled to seek equitable relief and obtain an order of sale, while in the former case he simply avails himself of the relief afforded by a personal money judgment. It would be indeed an innovation in the law of limitations of actions if, instead of looking to the time of the accrual of the cause of action to determine when the statute is set in motion, we should be compelled to ascertain what step we should ultimately have to take in order to consummate the relief sought and enforce the judgment obtained in the action. If such were the law, no lawyer on earth could, at the time of the commencement of an action, advise his client in many instances, whether or no a claim were outlawed. So we say here, how can any plaintiff, in such a case as

this, tell in advance of procuring a judgment, whether he will ever have to invoke the assistance of the writ of mandamus, in order to satisfy his judgment. The expediency of following such a course would depend on numerous contingencies and the question of mandamus hence is obviously a false quantity in the solution of this controversy respecting the running of the statute. (See opening brief, p. 137, 112.)

On page 52 of his brief, defendant in error paints a glowing picture of an earthly paradise in this Rialto Irrigation District, which it seems to be intimated is the product exclusively of the water acquired by the district in exchange for its bonds. He omits to state that whatever little prosperity the district enjoys is principally resultant from the heavy investments made by its inhabitants in developing and acquiring water entirely distinct from the water so acquired, nor does he mention the fact that the flowing waters, conveyed to the district by the Semi-Tropic Land and Water Company, ceased to flow soon after the consummation of that transaction, and that ever since the pumping expense has proved an enormous burden. (Trans., p. 55.) Such a picture as is given by an opponent becomes, when the actual conditions are examined, a mirage as lacking in reality as the preposterous values placed on the water by defendant in error.

In his concluding remarks on the subject of the Statute of Limitations, defendant in error insists that he has not been sleeping on his rights. (Brief, p. 54.)

We challenge this statement. Although it is true he

commenced an action in San Bernardino county, in 1900, yet it is also true that the plaintiff never brought the suit to trial until the year 1906, and judgment was not entered therein until January 15th, 1907, under which judgment, Judge Bledsoe, now United States District Judge, held void all of the coupons sued on. This judgment was finally reversed in February, 1909 (155 Cal. 220), but the plaintiff never brought the action on for its second trial until the autumn of the year 1915, and the matter is still under advisement by the San Bernardino County Superior Court. In other words, more than fifteen years has elapsed since the action was filed, and it has not yet reached final judgment. The decision of Judge Bledsoe naturally furnished additional encouragement and foundation for the belief on the part of investors and settlers in the district, that these bonds, like so many other irrigation district issues, were void and under that belief, extensive improvements and developments have been made in the district.

Notwithstanding the lethargy and inaction of the defendant in error in the premises, and in spite of his neglect to sue before and press his dubious claims, he seems to think that there are equitable grounds for exempting him from the operation of the Statute of Limitations; to which notion, we reply, in the language of Lord Loughborough, "an equity arising out of one's own neglect. It is a singular head of equity". (4 Bro. C. C. 469.)

Nor does the language of the court in the nisi prius decision appearing on page 55 of defendant in error's brief apply here. In the first place, the corporate organ-

ization of the Rialto Irrigation District is being continued and thereby, the power to perform the duties of the district exists and, secondly, the county supervisors are always available in the event of the district failing to make proper assessments.

Date of Issuance of Bonds

Passing from the topic of the Statute of Limitations to some of the other points mentioned in the brief of defendant in error, it will be noted that he argues that as the court held that the bonds in Stowell vs. District, 155 Cal. 215, were issued in substantial compliance with the Wright Act, the same ruling should be made here.

On pages 156 to 158 of our opening brief, we commented on the Stowell case and advanced reasons why some of the remarks in that case should not apply here. As we said before, the court was there considering whether the bonds were void *upon their face,* by reason of the discrepancy existing between the date of the coupons and the bond, and the court was not considering a case where bonds were sold or exchanged and delivered many years after the date they bore. Here every bond mentioned in the amended complaint was delivered from 1895 to 1897. (See Trans., pgs. 26, 56, 57.) *These bonds were not involved in the Stowell case,* and yet counsel seems to intimate that the testimony in that case showed deliveries of these bonds from 1895 to 1897. (Brief, p. 57.)

When he cites page 60 of the transcript in the case at bar, to verify this assertion, an examination of that page

will disclose that the bonds mentioned thereon, are the bonds in this suit—not the Stowell suit. (Trans., pgs. 26, 60.) The Stowell case, as regards the discussion of the date of the bonds there involved in the briefs and in the opinion, really revolved round the question whether January 1st, 1891—the date interest commenced—or November 17th, 1890—the date appearing on the bond, should be deemed the date of issuance of those bonds, and there was no finding in that case showing that *any bond was delivered after January 1st,* 1891. The stress of the argument in that case appears to have been placed on the theory that November 17th, 1890, was the real date of the bonds, and it was insisted by the respondent in that case that those bonds were issued after that date.

The Supreme Court points out (155 Cal. 222) that the trial court found "that the bonds were signed on *or about* December 21, 1890, and that none of them were disposed of or delivered prior to December 21st, 1890". The court then holds that those bonds "are to be regarded as, in effect, issued on January 1st, 1891".

The question as to whether such bonds could be legally delivered many years after January 1st, 1891, was not considered by the court, and why should it have been when such question does not seem to have been argued? In the petition for rehearing the respondent, on page 18, says:

> "Just when these bonds were issued does not appear. . . . When they were so delivered does not appear."

It is evident the California Supreme Court did not

consider the question presented here, especially when it is remembered that none of the bonds mentioned in the amended complaint (Trans., p. 26) were ever before the California Supreme Court. This is shown by the language of the court when it says:

> "The points, made by respondent, are that the bonds did not bear date at the time of their issue, as required by the act, and that they were made payable at periods *longer* than those authorized by the statute."

Of course, it is plain that delivering bonds, years after their date, would make them payable at periods *shorter* —not longer—than those authorized by the statute.

If there was testimony to the effect counsel claims before the Supreme Court in the Stowell suit, it was clearly irrelevant and did not concern the bonds in that suit, and evidently was not considered by the court.

It is also urged that if the word "issue", used in the Wright Act, means emission of the bonds, the directors would be unable to "*immediately* cause bonds in said amount to be issued", as required by Section 15 of the original Wright Act. (Brief, pgs. 61, 62.) But this section was amended before 1895 and prior to the issuance of the bonds mentioned in the amended complaint, and the word "immediately" was eliminated from the amended section. The portion of the amended section bearing on this subject is found in California Statutes for 1891, at page 148, and reads as follows:

> "If a majority of the votes cast are 'Bonds—Yes', the Board of Directors shall cause bonds in said amount to be issued; if a majority of the votes cast

at any bond election are 'Bonds—No', the result of said election shall be so declared and entered of record, and whenever thereafter said Board in its judgment deems it for the best interests of the district that the question of issuance of bonds in said amount, or any amount, shall be submitted to said electors, it shall so declare of record in its minutes, and may thereupon submit such question to said electors in the same manner and with like effect as at such previous election. Said bonds shall be payable in gold coin of the United States, *in ten series,* as follows, to-wit: At the expiration of eleven years, five per cent *of the whole number* of said bonds; at the expiration of twelve years, six per cent; at the expiration of thirteen years, seven per cent; at the expiration of fourteen years, eight per cent; at the expiration of fifteen years, nine per cent; at the expiration of sixteen years, ten per cent; at the expiration of seventeen years, eleven per cent; at the expiration of eighteen years, thirteen per cent; at the expiration of nineteen years, fifteen per cent; at the expiration of twenty years, sixteen per cent; and shall bear interest at the rate of six per cent per annum, payable semi-annually, on the first day of January and July of each year. The principal and interest shall be payable at the place designated therein. Said bonds shall be each of the denomination of not less than one hundred dollars, nor more than five hundred dollars; shall be negotiable in form, signed by the President and Secretary, and the seal of the Board of Directors shall be affixed thereto. *Each issue shall be numbered consecutively as issued;* and the bonds of each issue shall be numbered consecutively,

and bear date at the time of their issue. Coupons for the interest shall be attached to each bond, signed by the Secretary. Said bonds shall express on their face that they were issued by authority *of this Act, stating its title and date of approval,* and shall also so state *the number of the issue of which such bonds* are a part. The Secretary shall keep a record of the bonds sold, their number, the date of sale, the price received, and the name of the purchaser. In case the money raised by sale of all bonds issued be insufficient for the completion of the plan of canal and works adopted, and additional bonds be not voted, it shall be the duty of the Board of Directors to provide for the completion of said plan by levy of assessments therefor."

By comparing this amended section with the original section, appearing on page 49 of our opening brief, it will be observed that several changes are made by this amendment of 1891, some of which are as follows:

(1). No time is fixed within which the bonds are to be issued;

(2). The bonds are to be made payable in ten different series. This is quite a different proposition from making installments of all the issued bonds mature from time to time, as provided by the Act of 1887. Under the scheme of the amendment, there were to be *no installment payments on the principal at all,* but each distinct series was to be entirely payable on the maturity date fixed by the amendment.

(3). Each issue is to be numbered consecutively as issued, and the bonds of each issue are to be numbered consecutively and bear date at the time of their issue.

This provision also constitutes an innovation upon the Act of 1887. Under the latter act, the bonds, it is true, were to be numbered consecutively as issued, but no numbering of the different issues was provided for under that act.

(4). The bonds are to express on their face that they are issued by authority of *this Act, stating its title and date* of approval, and shall also so state the *number of* the issue of which such bonds are a part.

These amendments were not called to the attention of the court in the Stowell case, nor we believe in any other case which involved bonds delivered after the amendment. When the well settled rule is that "the authority of a public agent depends on the law as it is *when he acts.*" (Anthony vs. Jasper County, 25 L. Ed., U. S.., 1005, and see the opinion of this Circuit Court of Appeals in Wright vs. East Riverside Irrigation District, 138 Fed. 313, which last case the Federal Supreme Court declined to review in 50 L. Ed., U. S., 623); and when the final and most important act of the whole transaction was the *delivery* of these bonds—prior to which time, of course, they were of no more value than waste paper—it is clear the officers of the district were bound by the mandatory terms of the amendment and it was incumbent upon them to make the bonds emitted by the district after the amendment conform to that amendment. Especially must this be true in the light of the stringent provisions of Section 42 of the Wright Act. (See opening brief, pgs. 45, 46, 150, 161, et seq.)

It is very obvious that so long as these bonds—although they had been executed—remained in the treasury of the district, no vested rights of any kind could be affected by an amendment made to the act, under which act, the election authorizing the bonds had been held. Possibly, it would not be necessary to hold another election, but we do submit that the amendment governed the acts of the officers in incurring an obligation by issuing the bonds after such amendment.

In referring to the operation of statutes upon incomplete transactions, Endlich, in Section 284 of his treatise on Interpretation of Statutes, says:

> "Where an act declared, as a rule of construction of wills, that a general devise or bequest of the testator's real or personal estate should operate as an execution of a power of appointment, unless a contrary intention appeared in the will, and declared the act operative as to the wills of all persons who should die after the date of its passage, this was held to extend the act, in terms, to all cases of wills *executed before,* as well as after, its passage, where the testator died since the same."

In Section 281 of the same work, it is said:

> "Mere inchoate rights, depending for their original existence upon the law itself, may be abridged or modified by the Legislature at its pleasure, and statutes will not be presumed not to affect such rights existing in an unperfected state at the time of the enactment. As a general rule, whenever a statute gives a right, in its nature not vested, but

> remaining executory, if it does not become executed before a repeal of the law giving it, it falls with the law and cannot be afterwards enforced."

Again in Section 280 of the same work, it is said:

> "A statute is not retrospective, in the sense under consideration, because *a part of the requisites* for its action is drawn from a time antecedent to its passing."

See also footnote in 36 Cyc., p. 1203, and Aspinwall vs. Daviess County, 16 L. Ed. (U. S.) 296; Wadsworth vs. Supervisors, 26 L. Ed. (U. S.) 222. So we say here, *merely because* an election was held authorizing bonds, and subsequently the statute was amended expressly changing the form of the bonds, it would be an untenable contention to assert that because of the prior election which is "a part of the requisites" for the action of the amendment, such amendment could not apply to bonds emitted after the amendment, when section 42 of the Act unequivocally declares that the officers of the district shall have no power to incur any debt *"by issuing bonds* or otherwise in excess of the express provisions of the act". (Wadsworth vs. Supervisors, 26 L. Ed. (U. S.) 222; Aspinwall vs. Commissioners, 16 L. Ed. (U. S.) 296.)

The "express provisions" of the act were entirely ignored with respect to these bonds, and these bonds, delivered years after the amendment, utterly fail to comply with its provisions and, among other defects, it will be found that they not only fail to be payable in series, but also omit to recite that they were issued under

the amended act, or to give its title ("An Act to amend an Act entitled 'An Act to provide for", etc.) (Stats. 1891, p. 148), or to give its date of approval (March 20, 1891), or to state the number of the issue, or to number the issues consecutively as issued.

The amendment also states that the bonds are to be signed by the president and secretary and the coupons by the secretary. When it is remembered that this means by the *then* president, and the *then* secretary, it follows, we submit, that these bonds should have been signed by the persons who respectively held the office of president and secretary, and that the coupons should have been signed by the person who was secretary, at the time the bonds were emitted. (Wright vs. East Riverside Irr. Dist., 138 Fed. 313.) It has also been held that even an innocent purchaser of bonds reciting compliance with the Act under which they were issued, is not protected, if the persons signing the bonds have not the official character they purport, upon the face of the bond, to possess. (Coler vs. Cleburne, 33 L. Ed. (U. S.) 146.)

Now, while it is true that A. B. Fowler was the president and D. Robinson was the secretary of the board of directors of the district, upon the date the bonds and coupons purport to have been executed (November 17th, 1890—Trans., p. 22), and upon the date the bonds were in reality executed (on or about December 21st, 1890—brief of defendant in error, p. 57), yet on March 7th, 1893, Fowler ceased to be president and C. A. Kingman was elected president in his place and Fowler never afterwards held that office, which accounts for Kingman

executing as president the contract of June 12th, 1893 (Trans., p. 115). It also appears that Robinson was not secretary after February, 1894 (Trans., pgs. 59, 118).

From the allegations in the amended complaint, the theory of defendant in error seems to be that the "date of issue" of the bonds was January 1st, 1891 (Trans., pgs. 25, 26). Although the allegations of the "issuing" of these bonds contained in the amended complaint would seem to be purely legal conclusions, and hence the truth of the same would not be admitted by absence of denials traversing them, yet the plaintiff in error does deny: That any of the bonds were lawfully issued (Trans., p. 33); that the apparent date of the bonds, as distinguished from their true date, was November 17th, 1890 (Trans., p. 34); that any of the bonds or coupons were made payable as of the date of January 1st, 1891 (Trans., p. 35); or that January 1st, 1891, was the date or date of issue of any of the bonds. (Trans., p. 36.) Furthermore, it is specifically alleged in the answer of plaintiff in error that none of the bonds were delivered on November 17th, 1890, or on January 1st, 1891, and that none of them bear date at the time of their issue (Trans., p. 36), and that none are made payable in the time prescribed by the statute (Trans., p. 37).

We submit therefore, that the allegations in the answer are amply sufficient to constitute an issue on these points and that antedated bonds, executed in form, which did not comply with the statute in force when they were finally emitted over the signatures of persons who, at the time of such emission, had long ceased to be

officers of such district, cannot constitute binding obligations of the district. We reiterate, that although the persons executing the bonds were the officers of the district at the time of such execution, yet, in the words of the California Supreme Court, "executing *is not issuing,* for they may be fully executed, but never issued". (Sechrist vs. District, 129 Cal. 640.)

As we said before, it has been held that the word "issued", when applied to irrigation district bonds, means actual delivery (Sechrist vs. District, 129 Cal. 640; O'Neill vs. Irrigation District, 121 Pac. 283; opening brief, p. 155); and this Circuit Court of Appeals has already held, in referring to the antedating of similar bonds, in Wright vs. East Riverside Irrigation District, 138 Fed. 313, that:

> "The direct and necessary effect of which is to make them payable within a shorter time than is provided by the statute for their payment, which provision is, as a matter of course, of *the essence of the law, and not a mere matter of form.*"

In the Stowell case, 155 Cal. 223, the court says:

> "The power of public corporations to issue bonds is to be exercised in the manner prescribed by statute. 'There can be no doubt that it is within the power of a state to *prescribe the form* in which municipal bonds shall be executed in order to bind the public for their payment. If not so executed they create no legal liability'. (Anthony vs. County of Jasper, 101 U. S. 693.) Where the statute has fixed the term for which bonds shall run, bonds in which payment is undertaken at the expiration of either a shorter (People's Bank vs. School District,

3 N. Dak. 496; 57 N. W. 787) or a longer term (Norton vs. Town of Dyersburg, 127 U. S. 160; 8 Sup. Ct. 1111; Barnum vs. Okolona, 148 U. S. 393; 13 Sup. Ct. 638) than that authorized *are invalid.*"

In addition to the authorities we cited on page 149 of our former brief, to the effect that the word "issue" means final emission or delivery, there will be found a multitude of authorities on this subject.

In the recent case of Moreing vs. Shields, decided October 5th, 1915, by the California District Court of Appeals, and reported in 152 Pac., p. 964, reclamation district bonds were involved, and the court said:

"It is the contention of respondents that bonds have been issued herein for the reason that they have been executed and placed in the hands of the treasurer. We are satisfied that this is a mistaken view of the significance of the term. It cannot be said that the bonds have been issued until they have been sold and placed in the hands of third parties, so as to create an obligation against the district. The term "issue" as applied to bonds has been construed in many decisions which are collated by petitioners from which we make a few quotations. In Sechrist vs. Rialto Irrigation District, 129 Cal. 640, 62 Pac. 261, the question was whether certain irrigation district bonds were barred by the Statute of Limitations, and the court, through Commissioner Chipman, declared:

"But it cannot be maintained that the bonds were issued in the sense of the statute until they were delivered for a valuable consideration. It was said in Brownell vs. Greenwich, 114 N. Y. 578 [22 N. E. 24, 4 L. R. A. 685], speaking of certain bonds in

litigation: "They bear the date of March 25, 1871, and are presumed to have been executed at that time; but executing is not issuing, for they may be fully executed but never issued. . . . . The bonds had no legal inception, and could not become valid obligations, aside from any other question, until actually delivered for a valuable consideration. Under the circumstances, we think that the delivery of the bonds to the plaintiff determines the date when his bonds were issued' ".

"In Corning vs. Board of Commissioners, 102 Fed. 57, 42 C. C. A. 154, we find the following:

"It (referring to the word 'issued') is a common, plain word, whose usual significance is well known to persons of ordinary intelligence. In the absence of other definition in the statutes of Kansas, the presumption is strong that the Legislature used it, and intended to use it, in its accustomed sense. It was used in laws relative to the sending forth of municipal bonds; laws upon which the officers of the state, of the counties, of townships, and of school districts, and the purchasers of the bonds of these quasi municipal bodies must rely, and which they must interpret. These officers and purchasers have interpreted and acted upon these laws without notice from the Legislature that they intended that this word should have any strange, broad, and unusual meaning in these statutes. In this state of the case no definition will be found so safe, so just, or so equitable as the ordinary meaning of the word—the meaning which the word at once conveys to the ordinary apprehension—and that is to 'emit', to 'send forth.' "

> "In City of Austin vs. Valle (Tex. Civ. App.), 71 S. W., 414, it is said that, as used in a city charter providing that when bonds were 'issued' a fund be provided to pay the interest and for a sinking fund, the word 'issued' referred to the time of the sale of the bonds, or when they passed into the hands of some one who claimed them as a debt against the city.
>
> "A large number of other cases is cited to the same effect, but, indeed, it is plain enough from the context that the word 'issued' signifies the delivery into the hands of a purchaser".

In the syllabus of the case of Perkins County vs. Graff, decided by the Circuit Court of Appeals, 114 Fed. 441, it is also said:

> "The verb 'issue' means to emit or send forth, and it does not embrace the preliminary acts of signing and dating, but *is confined to the delivery of bonds."*

In Germania Savings Bank vs. Suspension Bridge Co., 26 N. Y. S. 98, it was held that:

> "The term 'issue', as applied to negotiable paper, means its *delivery* for use and circulation."

It is further argued that if the bonds should be dated at time of delivery, it would become necessary for the directors to levy assessments, in excess of the amount needed to meet the maturing amounts of the principal of the bonds. (Brief, p. 63.) This supposition is based apparently on the language of Section 22 of the Act of 1887, set forth on page 63 of our opponent's brief. But this section was also amended in 1891, long before these bonds were emitted, to read as follows:

"Section 22. The Board of Directors shall then levy an assessment sufficient to raise the annual interest on the outstanding bonds, and at the expiration of ten years after the issuing of bonds of any issue must increase said assessment to an amount sufficient to raise a sum *sufficient to pay the principal of the outstanding bonds as they mature.*" (Cal. Stat. 1891, p. 149.)

If there were ever any grounds for the theory indulged by our opponent, it is clear that they were swept away by the amendment which expressly provides that it is only necessary to raise by levy an amount "sufficient to pay the principal of the outstanding bonds as they mature", but in any event, and irrespective of the amendment, mere inconvenience respecting assessments or financial arrangements of an irrigation district, cannot be permitted to upset the express terms of a statute.

In the Stowell case the court obviously employed the word "issue" in its usual and well accepted sense, when it says: "So long as it did not *issue* any bonds until it received as consideration therefor, the property", etc. (155 Cal. 221.) If defendant in error's contention be correct that the word only means "the authorization and preparation of the bonds, including the date from which they are to run" (brief, p. 64), then all these bonds were illegally issued, as they were prepared before any property was received as consideration therefor.

Bonds Were Issued for Unlawful Consideration

On pages 158 to 161 of our opening brief, we dwelt upon the illegal character of the consideration for the

bonds sued on herein. The testimony shows that all of the bonds embraced in the amended complaint were delivered to Stowell under the contract of January 2nd, 1895 (Trans., pgs. 26, 57, 115), and we will not repeat what we before said on this subject.

Counsel says that this contract "was taken from the transcript in the case of Stowell vs. Rialto Irrigation District", and he further states that "this particular contract was before the Supreme Court of California in the case referred to and that court held the bonds issued by the district valid". (Brief, p. 66.) Counsel is laboring under a misapprehension in making these statements. At least, we have been unable to find this contract set forth in our copy of the transcript printed in the Stowell case. It is difficult to see why it would have entered into that controversy, for, as we have already said, the bonds sued on, in the amended complaint here, were not sued on in the Stowell case. As a matter of fact, the opinion in the Stowell case very clearly shows that those bonds were the bonds delivered under the contract made by the Semi-Tropic Land and Water Company with the district, the court distinctly saying:

> "The coupons held by plaintiff were all attached to bonds which had been so received *by the Semi-Tropic Company.*" (155 Cal. 219.)

The evidence in the case at bar shows that all of the bonds mentioned in the amended complaint were received by Stowell—not by the Semi-Tropic Company—and were delivered to him under his individual contract

of date January 2nd, 1895 (Trans., p. 57), which contract is not mentioned nor considered by the court in the Stowell case.

It is also argued by defendant in error (brief, p. 66), that the stipulation, made prior to the trial, to the effect that "the consideration that said district received for the bonds issued and which the bonds mentioned in this suit are a portion, was six hundred and fifty inches of water, pipelines", etc. (Trans., p. 52), precludes our now asserting that the bonds were issued for an invalid consideration. We submit that the stipulation does not have such effect. We do not deny that the district ultimately received the pipe mentioned in the contract of 1895, but the trouble with the transaction was that the consideration was not contemporaneously received by the district when it delivered the bonds. (See opening brief, p. 158). An irrigation district is not allowed to part with its bonds on credit, and yet that method was pursued here.

As counsel says (brief, p. 66), this stipulation was entered into prior to the trial of the case. After this stipulation was made, a second stipulation was made, to the effect that certain instruments and testimony received in the Stowell case and *certain other instruments,* should be deemed in evidence in the case at bar (Trans., p. 58). Of course, both stipulations have to be read together and it was under this subsequent stipulation that the contract of 1895 and the evidence regarding delivery of the bonds was admitted in this case. It would be a somewhat startling doctrine to contend that a prior stip-

ulation cannot be qualified or modified or changed by a subsequent stipulation in the same suit, when it has been held that a stipulation does not prevent the introduction of other evidence on the same subject covered by such stipulation. (Dillon vs. Cockcroft, 90 N. Y. 649; Commonwealth vs. Young (Mass.) 43 N. E., 118).

If counsel be correct in his theory regarding this matter, it would follow a contractor could legally make a contract with such a district, for making pipe, extending over a period of many years, and under the terms of such contract, obtain bonds from the district perhaps ten years before the completion of the work. In such event, it might in a sense be truthfully said (as was said in the stipulation), if the pipe were ultimately made according to the terms of such contract, that the bonds handed out in the meantime, were issued for the consideration mentioned in the contract, to-wit: the pipe. But such method of obtaining the bonds prior to the completion and delivery of the pipe, would be illegal. (Opening brief, p. 159.)

Decree of Confirmation

It is further argued that "the district admits the issuance of a bond bearing on its face a date prior to the filing of its own petition for confirmation". (Brief, p. 68.) It is true the bonds were dated November 17th, 1890, but the uncontradicted evidence here shows the bonds were not in existence on that date, nor on the date when the petition for confirmation was filed (Trans., p. 64, and opening brief, p. 196). The allegations in the

amended answer of the district, state the matter correctly when it is alleged that the confirmation proceeding was brought solely for the purpose of determining the regularity of certain proceedings preliminary to and providing for and authorizing an issue of bonds. (Trans., p. 36). This is quite different from attempting to obtain an adjudication upon the validity of bonds already issued. Of course, such a proceeding would not have a prophylactic effect upon the bonds or render them immune from the effect of acts performed, in issuing the bonds subsequent to the decree of confirmation, in defiance of the Wright Act.

We do not go so far as to say that a decree of confirmation is indispensable to the validity of irrigation district bonds, although counsel—owing perhaps to the somewhat ambiguous statement we made, on page 196 of our former brief in following the language of the assignment of error—seems to think that we so contend (brief, p. 67). We do insist, however, that under the authority of Stimson vs. District, 135 Cal. 394, the court had no jurisdiction in the premises, when it attempted to confirm bonds, exchanged or used for acquiring property under Section 12 of the Wright Act. (See opening brief, p. 197.) It is undeniable that these bonds were so used, and that they were not sold pursuant to Section 16 of the act, and hence the language of the California Court is applicable when, in the Stimson case and referring to the Confirmation Act, it says:

> "It evidently refers to the provisions of the original act for the sale of bonds, which are to be found

> in Section 16 of that act (Wright Act). It has no reference to the provisions of Section 12."

There being no statutory authority for such a proceeding and the court having no jurisdiction of the subject matter, it is futile to argue that any estoppel can arise against the district by reason of a decree based on a petition filed on December 12th, 1890 (Trans., p. 36), at which time the bonds were non-existent and the court was without power to render a decree establishing the validity of the bonds under the existing circumstances.

In Section 68 of Herman on Estoppel and Res Judicata, it is well said:

> "If a court has no jurisdiction its decision is a nullity, and it matters not what facts it finds, or what questions it decides—in fact, they are all nullities. If without jurisdiction it cannot adjudicate the real merits of the case, it cannot adjudicate any other question, whether it be introductory, incidental, or collateral."

We have seen that our opponent argues that the bonds are non-negotiable, hence it can hardly with good grace be claimed by him that he can invoke the benefits, arising from the doctrine which protects innocent purchasers for value; but even if he were such an innocent purchaser, the original infirmity in the bonds would still inhere (opening brief, pgs. 161 to 175). Above and beyond all, every bond mentioned in the amended complaint herein, was acquired by the defendant in error directly from the district, which fact alone would, of

course, leave no rom for the operation of such doctrine.

We respectfully submit that the judgment should be reversed.

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